



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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MEMORANDUM

SUBJECT: Acid Rain Compliance/Enforcement Guidance

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Region VI

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Regions VII, VIII, IX, and X

The Stationary Source Compliance Division (SSCD) and the Air Enforcement Division (AED) have developed the Acid Rain Compliance and Enforcement Guidance document (Attachment 1). This document was developed with input from the Acid Rain Division (ARD) and the Regions. The purpose of the guidance is to assure national consistency in enforcing the acid rain program by identifying functions and roles in the enforcement process and recommending minimum enforcement actions to be taken for specific violations. The guidance should be used along with the Agency penalty policy and the Acid Rain Addendum to the February 7, 1992, Timely and Appropriate Enforcement Response to Significant Air Pollution Violators (SVT&A Guidance) in addressing violators of the Acid Rain Regulations. The addendum is included as Attachment 2.

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In addition, a compliance and enforcement workgroup has been formed to coordinate enforcement approaches on a case-by-case basis as violations occur. Monthly conference calls are held to discuss the compliance status of Phase I sources and the appropriate enforcement response(s) for any violations.

We hope that these efforts will help in facilitating the successful implementation of the acid rain rules and focus the compliance and enforcement resources where they will provide the best results.

Attachments

cc: Regional Counsels
Acid Rain Enforcement Work Group Members

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A T T A C H M E N T 1

ACID RAIN COMPLIANCE/ENFORCEMENT GUIDANCE

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ACID RAIN
COMPLIANCE / ENFORCEMENT
GUIDANCE

This document is intended solely for the guidance of government personnel. It is not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any part in litigation with the United States. The Agency reserves the right to act at variance with this guidance and change it at any time without public notice.

ACID RAIN COMPLIANCE/ENFORCEMENT GUIDANCE

INTRODUCTION

Title IV of the Clean Air Act Amendments (the Act) of 1990 requires that the United States reduce emissions of sulfur dioxide (SO₂) and nitrogen oxides (NO_x) from utility boilers by 10 million and 2 million tons respectively. The acid rain rules implementing the major requirements of Title IV were promulgated on January 11, 1993 and include the permit, monitoring and allowance regulations required by the Act. Implementation of the acid rain regulations is a two-phase program involving multiple deadlines depending on the phase and related rules.

The implementation and enforcement process is a joint effort of the Office of Enforcement and Compliance Assurance (OECA), the Acid Rain Division (ARD) of the Office of Atmospheric Programs, EPA Regional Offices (Regions), and state environmental agencies (States). To maintain the acid rain program's integrity, all enforcing parties are expected to take a very aggressive approach to implementing and enforcing this program. Any violations of the acid rain program must be addressed along with all known violations of other air programs. In addition, since many of the potential acid rain violators are major sources, the violations may qualify as Significant Violations.

This guidance document addresses enforcement requirements for the Excess Emissions rule, Continuous Emissions Monitoring Systems (CEMS) rule, and Permit rule. This guidance document will be amended in the future to add the enforcement requirements for the NO_x rule. This guidance document outlines responsibilities for enforcement actions and provides recommended enforcement responses (Appendix 1 for the Excess Emissions rule, Appendix 2 for the CEMS rule, Appendix 3 for the Permit rule, and Appendix 4 reserved for the NO_x rule) for the specified violations. This guidance document should be used in conjunction with the Acid Rain Addendum to the February 7, 1992 guidance on Timely and Appropriate Enforcement Response to Significant Air Pollution Violators (SV/T&A Guidance) and the Agency penalty policy (Appendix 5 presents an index of EPA penalty/enforcement response guidances) to identify and address violations.

Although this guidance generally identifies most of the possible acid rain regulation violations, it does not necessarily identify all non-compliance situations. When the Regions or ARD encounter situations that may be violations of the rules but are not specifically addressed in this guidance document and cannot be addressed using Regional discretion, they should bring these cases to the attention of OECA. The Regional Offices and OECA will be involved in the resolution of these cases. The recommended enforcement response for these cases will be described and added to this guidance document as part of

Appendix 6, Supplemental Enforcement Actions.

RESPONSIBILITIES OF PARTIES

The Office of Enforcement and Compliance Assurance is responsible for determining compliance with accounting and reporting provisions of the Excess Emissions and CEMS rules. The AED will take the lead on enforcement actions involving provisions as indicated in Appendices 1, 2, and 4, and will coordinate enforcement responses against multi-Regional violators. OECA will also provide guidance and assistance to the Regions on enforcement-related issues, coordinate enforcement actions with ARD and the Regions, provide legal and technical support, help prepare legal packages, and coordinate enforcement actions with the DOJ, when applicable. The OECA will review copies of all administrative penalty orders and the administrative consent agreements filed by the Regions. The OECA will initiate a coordinated enforcement response action against a utility with violations at power plants located in different Regions. The OECA will work closely with the Regions and ARD on these actions.

The OECA will prepare materials for filing or for referral to DOJ. The OECA will coordinate with the Regions, ARD, and DOJ on all civil judicial referrals. For Headquarters-led Administrative Penalty Orders (APOs) and civil judicial referrals, OECA attorneys will fulfill the role of the Agency's attorneys, preparing materials for filing or for referral to DOJ. The OECA's Criminal Investigation Division will investigate the Headquarters-led criminal cases.

The Acid Rain Division is responsible for certain aspects of program implementation, particularly for administering the accounting provisions of the rules, issuing permits, and participating in oversight of certain reporting procedures. ARD will, in cooperation with OECA, generally identify potential violations related to reporting requirements, allowance accounts, and allowable emission rates. Within 30 days of identifying potential violations, ARD will notify the Regions and OECA and provide all documentation on these violations. ARD will also prepare and provide to OECA and each applicable Region a summary of the units' Allowance Tracking System (ATS) account status no later than 90 days after the end of any calendar year. In addition, within 90 days after the end of a calendar year, ARD will provide OECA with a list of utilities that exclusively rely on SO₂ allowances as a compliance method so this information can be used as a targeting tool to help assess compliance with other regulations.

The EPA Regional Offices are responsible for determining compliance with the program (except for the accounting and

reporting provisions of the Excess Emissions and CEMS rules) and providing information on the violators to OECA. The Regions will take the lead on enforcement actions for violations as indicated in Appendices 1-4, except where nationally-coordinated enforcement responses are appropriate against multi-Regional violators, in which case headquarters would have the lead. Upon receipt of permit applications, monitoring plans, notifications of CEMS certifications, CEMS certification reports, and any information (from field inspectors) on violations of CEMS operation, maintenance, and calibration, the Regions will identify violations and violators. All violations must be appropriately addressed.

In addition, in Phase II, the Regions may consult EPA Headquarters if needed or when an approach to a particular situation has not been developed in Phase I and listed in Appendix 6 (Supplemental Enforcement Actions). In addition, the Regions will use all information provided by ARD on the status of the ATS account to identify violators and initiate enforcement actions. The Regions will notify AED about these actions.

The Regions will submit copies of all administrative penalty orders, all signed consent agreements and penalty justification documentation to the Air Enforcement Division (AED) of OECA within 20 days of filing or entry to ensure a proper coordination of the program's enforcement. The Regions will refer civil judicial actions to DOJ with copies to AED for review and approval.

The Regions must assure that the regulated utilities are in compliance with other relevant regulatory air programs and take enforcement actions on all known violations of these programs concurrently with enforcement responses against the acid rain rule violations. In addition, the Regions will enter all Significant Violators (and the subsequent enforcement actions) into the Aerometric Information and Retrieval System (AIRS) following the SV/T&A Guidance. AIRS will be used as a tracking system for violations and enforcement responses. Acid rain violations and enforcement responses should be entered into the system using the acid rain air program code.

The State environmental agencies will actively assist the Regions in any enforcement actions in Phase I and Phase II. In Phase II, the Regions, at their discretion, may defer some enforcement actions to the States if the States propose adequate enforcement response plans.

All parties involved in the implementation, compliance, and enforcement processes will direct inquiries about coordinating acid rain compliance and enforcement requirements with the requirements of the NSPS and SIP programs to OECA.

COMPLIANCE AND ENFORCEMENT RESPONSES

The Act provides EPA and its delegates broad authority to uncover violations, return a violator to compliance, and assess penalties for violations. Section 114 of the Act delineates the Agency's authority to collect compliance information. The Agency's authority to compel compliance and to assess penalties is set forth in Section 113. While Section 120 of the Act authorizes the assessment of noncompliance penalties equal to the economic benefit of noncompliance, this authority provides less flexibility than Section 113 remedies that confer the same benefits. For this reason, Section 120 has not seen frequent use. Various compliance and enforcement response options available to the enforcing agency (i.e. States, EPA Regions, or EPA Headquarters) are discussed below. Because selection of the appropriate enforcement response option depends on the circumstances surrounding a particular event, this guidance describes the advantages and limitations of each form of response.

The response options are presented here in order of ascending stringency. The enforcing agency should select a sanction commensurate to the seriousness or number of the violations and the recalcitrance of the violator. Please note that selection of one enforcement response does not foreclose the enforcing agency's ability to initiate another response using a different enforcement authority. Reliance on this guidance should not replace existing case screening procedures.

Addressing Potential Violations

Because determinations of compliance with the acid rain requirements will likely be founded on pervasive self-reporting representative of the unit's compliance status, reported data indicating a violation will almost always be sufficient by itself to support a finding of violation. On those rare occasions when the overseeing agency decides that additional monitoring or analysis is required to determine or confirm the violation, Section 114 of the Act permits collection of any relevant information that can be used to determine whether a person is in violation of any provision of the Act. Overseeing agencies should be mindful of the necessity of notifying sources of violations at the earliest appropriate date.

Notification of discovered violations should not be delayed while the agency investigates other potential violations (see discussion below). The following three information gathering techniques are perhaps most useful.

Information Request

When the overseeing agency can precisely delineate the

information it needs to complete its compliance determination, it should send the suspected violator a "Section 114 letter" (or State equivalent) requiring the recipient to supply that information by a specified deadline. In such circumstances, surgical use of potentially very broad Section 114 authority recovers the necessary information quickly and without placing undue burden on either the enforcing agency or the regulated entity. A source's failure to provide the requested information constitutes a separate enforceable violation.

Site Inspection

Site inspections outside the normal inspection cycle should be conducted when the overseeing agency cannot rely on information submitted in response to a Section 114 letter to complete its compliance determination. Circumstances in which a site inspection might be appropriate include required stack tests or agency review of records kept on site that are too voluminous for the source reasonably to copy and submit.

Administrative Subpoena

Section 307(a) of the Act allows EPA to issue an administrative subpoena requiring a person to appear, with documents as needed, and give testimony under oath. The purpose of the administrative subpoena is to gather any information and documents related to the Act that EPA wishes to receive from a person. The Agency need not have evidence of a violation or have commenced an administrative proceeding before it uses this investigatory tool. Administrative subpoenas are similar to those issued by courts, but are issued by EPA under its own authority. The administrative subpoena power could be very useful in the acid rain program to get testimony and documents from designated representatives. Administrative subpoenas should only be used prior to the filing of a judicial complaint; after that time, a deposition is the proper vehicle for obtaining testimony prior to trial. EPA must pay subpoenaed persons the same fees for time and mileage that the federal court would pay in those circumstances. If a person fails to appear for an administrative subpoena, the federal district court can, following application by the United States, issue its own subpoena to the person or hold that person in contempt.

Addressing Violations

Once the overseeing agency determines that a violation occurred, it should send notice of its findings to the violator. From that point forward, the enforcing agency has two goals: to return the violator to compliance; and to recover a penalty that removes the violator's economic benefit of noncompliance and serves as a credible deterrent to future violations. The Act provides a number of options for each step of this process.

Finding of Violation

There are several reasons why the overseeing agency should notify the source of a unit's violations. First, Section 113(a) of the Act requires that the Administrator or his/her delegatee notify a source that it has been found in violation of a SIP or permit requirement at least 30 days before initiating an enforcement action in either the administrative or a judicial forum. The SV/T&A Guidance dictates that SIP and NSPS violations by major sources must be addressed by either a Notice of Violation (SIP violations) or a Finding of Violation (non-SIP violations) by day 45. For the purpose of the non-permit acid-rain program violations, the use of an FOV is appropriate.

Notifying the source of its violations also shifts the burden of proof for penalty purposes, allowing EPA to assert that the source's violations continue until the source can demonstrate that it has achieved compliance. In addition, notifying the source may alert it to the violations of which it was unaware and allow the source to initiate compliance efforts at the earliest possible date.

Whenever a violation is plain on the face of a source's report (i.e. required data is missing), the enforcing agency should issue the FOV. Additional information relating to other potential violations can be requested under Section 114 authority as part of the FOV. Issuance of the FOV is a recommended incremental step prerequisite to an adequate enforcement response, and should not be considered the goal of the Agency's enforcement process. Following the issuance of the FOV, the enforcement process should proceed unless information gathered after the issuance of the FOV indicates either that the Agency lacks sufficient evidence of violation to support further action or that no further action is warranted.

Field Citation

Section 113(d)(3) of the Act gives EPA authority to issue field citations (FC) assessing penalties not to exceed \$5,000 per violation per day. While regulations and guidance implementing this authority are not yet in place, field citations will most likely be used to address minor violations that are few in number and which can be easily detected, readily proved, and simply corrected. Where a source has numerous minor violations or a prior history of similar violations suggesting careless disregard for the regulations, the Agency should rely on the more stringent enforcement remedies discussed below.

Administrative Compliance Order

Section 113(a) authorizes the overseeing agency to order a violator to return to compliance as expeditiously as possible,

but in no event longer than one year after the date the order was issued. Such orders should always specify the date by which compliance must be achieved and should, where applicable, include verifiable interim milestones. A source's failure to comply with an administrative compliance order (ACO) is a separate enforceable violation. Issuance of an ACO is appropriate where the actions necessary to achieve compliance are straightforward, clearly can be completed in less than one year, and the agency believes that the source will perform the required actions. An important limitation of the administrative compliance order is that it cannot assess a penalty.

Administrative Penalty Order

Administrative penalty orders (APO's) under Section 113(d) are the flip side of ACO's. By means of an APO, the overseeing agency can assess a penalty, but cannot order compliance. Because APO's and ACO's complement one another, they are often issued in tandem. A source's failure to pay the assessed penalty is a separate enforceable violation.

The Act limits EPA's use of APO's in two important respects. The Agency cannot use an APO to address violations that occurred more than one year before filing, or to address violations for which the penalty (calculated in accordance with the Clean Air Act Stationary Source Civil Penalty Policy) exceeds \$200,000. While both of these limitations can be waived by joint agreement of the Administrator and the Attorney General, the limitations remain in place at this writing. Counts which relate to violations more than twelve months old should not be severed to allow issuance of an APO. Likewise, counts should not be dropped simply to bring the penalty assessment below \$200,000. EPA interprets the limitations to apply to all viable counts which are known at the time of filing.

Not all cases with penalty amounts less than \$200,000 and with violations less than 12 months old are appropriate for administrative enforcement. Please consult Michael Alushin and John Rasnic's October 29, 1991 memorandum titled "Guidance on Choosing the Appropriate Forum in Clean Air Act Civil Enforcement Actions" for a discussion of factors, such as evidence of multiple or repeat violations, a need for court-supervised injunctive relief, the necessity of extensive post-filing discovery, and the existence of new legal issues, the presence of which indicate that a case should be brought in the judicial, rather than administrative, forum.

Civil Judicial Actions

Section 113(b) of the Act authorizes civil actions seeking temporary or permanent injunctions and penalties of up to \$25,000 per day for each violation. Any enforcement action involving

violations more than one year old, seeking a penalty in excess of \$200,000 (where these limitations have not been waived) or necessitating imposition of a compliance schedule requiring more than one year of activity on the part of the defendant, must be filed as a civil action in accordance with Section 113(b) because the relief sought exceeds the authorities of Sections 113(a) and (d). The civil judicial (CJ) forum is appropriate when the Agency believes it will need the court's injunctive, discovery, or contempt authorities, and when the case presents precedential legal issues. Cases involving complex compliance issues are also better suited to a judicial action as a compliance plan resolving these issues can be negotiated as part of the consent decree resolving the action, and will then be enforceable by the court.

Criminal Sanctions

Section 113(c) authorizes assessment of criminal sanctions against any person (including a corporation or utility) who knowingly violates a requirement or prohibition of Title IV. Criminal sanctions may also apply if the violator knowingly provides false information to the United States. Suspected criminal activity should be reported either to the Regional office of the Criminal Investigation Division or Regional Criminal Enforcement Counsel. A separate civil action to address civil violations may be pursued in the judicial or administrative forum if immediate action is required to mitigate substantial danger to human health or the environment or other specified circumstances (see Procedures for Requesting and Obtaining Approval of Parallel Proceedings, June 15, 1989).

Contractor Listing

Section 306 of the Act mandates that no federal agency may enter into a contract with a person who is convicted of a criminal violation of the Act which would require performance at the facility where the violations occurred until such time as the Administrator certifies that the violations giving rise to the conviction have ceased. The Administrator may extend the prohibition to other facilities owned and operated by the convicted person. Regulations appearing at 40 C.F.R. Part 15 also provide the Administrator authority to prohibit contracts with persons in continuing civil violation of the Act. Such listing, whether mandatory or discretionary, can be a powerful tool for leveraging compliance from a recalcitrant violator.

VIOLATIONS/EPA RESPONSE

This section presents a brief description of violations under Parts 77, 75, and 72. For each rule, the violations are ranked according to their importance to the acid rain program. For instance, the two most significant violations of the CEMS rule are monitor installation and data reporting. In the Excess

Emission rule, the most important violations are related to allowance holding and the payment of penalties for excess emissions requirements and allowance holding.

The specific enforcement response applicable for each of the categories are presented in Appendices 1-3. The enforcement responses listed reflect the recommended minimum response within each category of violation depending on the violation's significance. According to the recommended enforcement responses, the most important violations may require an APO as a minimum. An NOV (or FOV for non-permit violations) should precede such an APO. It is expected that any enforcement action (except the Field Citation) involving a penalty will be accompanied by an ACO.

The enforcement responses provide the enforcement authorities with some flexibility. For certain minor violations, the Region may decide not to pursue the enforcement action after issuing an FOV if a subsequent investigation reveals that further action is not warranted.

The enforcement agency should undertake any one or all of the listed applicable actions, as appropriate, along with actions in response to known violations of other air programs.

Since the enforcement staff is familiar with most of the enforcement policies (Appendix 5), this guidance does not address any details of these policies. A specific guidance on field citations will be issued upon promulgation of the rule and will be added to Appendix 5.

Excess Emissions Rule

The following is a general description of possible violations under the provisions of the acid rain rule Part 77 - Excess Emissions. Three categories of potential violations are outlined below. Appendix 1 presents the specific minimum enforcement vehicles appropriate for the violations of the rule.

● Deductions versus Offsets

The designated representative (DR) must hold enough allowances in the appropriate compliance subaccount to cover the deductions to be made in accordance with paragraph (a) or paragraph (c) of section 77.5. An APO is a minimum level enforcement response.

● Penalties for Excess Emissions

The owner or operator must pay to the Administrator within 60 days an excess emissions penalty, as calculated under paragraph (b) of section 77.6. In all instances when the owner

or operator fails to pay the penalty without demand, the EPA shall either issue an APO or take judicial action.

• Offset Plans for SO₂

The excess emission provisions of the Rule require the designated representative for the unit to submit to the Administrator a complete proposed offset plan to offset excess emissions of sulfur dioxide. The offset plan shall be submitted not later than 60 days after the end of any calendar year during which excess emissions of sulfur dioxide occurred. Each day after the 60 day deadline that the designated representative fails to submit a complete proposed offset plan shall be a separate violation of this part. The minimum enforcement response is an APO.

CEMS Rule

The following is a general description of violations under the provisions of the acid rain rule Part 75 Continuous Emission Monitoring. Five categories of potential violations are outlined below. Appendix 2 presents the specific minimum enforcement responses appropriate for the violations in each of the four categories.

• Monitoring

The monitoring provisions of the Rule require the owner or operator of the affected facility to measure opacity, SO₂, NO_x, and CO₂ emissions for each affected unit by installing a CEMS or approved alternative monitoring system along with the data acquisition and handling system (DAHS) before the compliance deadline. A minimum enforcement response for the violation of this requirement is an APO.

• Reporting

The reporting provisions of the Rule require the designated representative to submit all certification or recertification notifications, certification or recertification applications, monitoring plans, petitions for alternative monitoring systems, notifications, electronic quarterly reports, and other communications required by 40 CFR Part 75 to the Administrator. Copies of the above requirements must be submitted to the appropriate Regional Office of the U.S. Environmental Protection Agency and appropriate State or local air pollution control agency.

A minimum suitable enforcement response in this violation category is an APO for failure to submit quarterly electronic reports and a Field Citation for all other violations.

• Operation and Maintenance

The operation and maintenance provisions of the Rule require the owner or operator of an affected unit to certify, operate, calibrate, and maintain each CEMS used under the acid rain program according to the quality assurance and quality control procedures in 40 CFR Part 75, Appendix B. The owner or operator also is required to ensure that all calibration gases used to quality assure the operation of the instrumentation required by 40 CFR Part 75 meets the definition in section 72.2 of this chapter.

The owner or operator must use the appropriate reference test methods included in 40 CFR Part 60, Appendix A to conduct monitoring system tests for certification or recertification of CEMS and quality assurance and quality control procedures. Additionally, if an out-of-control period occurs to a monitor or CEMS, the owner or operator must take corrective action and repeat the tests applicable to the "out-of-control parameter" as described in 40 CFR Part 75, Appendix B.

In all cases where there is a violation, the Region shall issue a Field Citation as a minimum.

• Missing Data Procedures

When the data for an affected unit has not been measured and recorded, the Rule requires the owner or operator to provide substitute data according to the missing data procedures in 40 CFR Part 75.

In all cases where there is a violation, the enforcing agency shall at least issue a Field Citation.

• Recordkeeping

The recordkeeping provisions of the Rule require the owner or operator to maintain for each affected unit a file of all measurements, data, reports, and other information required by 40 CFR Part 75 at the source in a form suitable for inspection for at least three (3) years from the date of each record. Compliance determinations are made on the basis of a review of the records at the production facility or company headquarters.

The owner or operator must also prepare and maintain a monitoring plan, and update the monitoring plan whenever a change has been made to either the certified CEMS or continuous opacity monitoring system including the DAHS or in the flue gas handling system that requires recertification.

Generally, recordkeeping violations will be addressed through the use of a Field Citation, as a minimum, issued by the

Region with responsibility for the plant. In instances where the inspector cannot verify the information in the quarterly report, or the company has changed its recordkeeping procedures without informing EPA, the Region will take enforcement action after consultation with OECA and in accordance with this guidance.

Permit Rule

The following is a general description of possible violations under the provisions of the acid rain rule Part 72 Permits and minimum penalties for these violations. Five categories of potential violations are outlined below. Appendix 3 summarizes the discussion that follows. Unless otherwise stated, actions are pursued by the Regions (or States in Phase II, if the Regions delegate the responsibility).

● Emission Limits

For this category of violations the minimum acceptable enforcement action will be an APO, but depending on the circumstances and past record, a more serious enforcement action (CJ, criminal) may be appropriate. Additionally, for the failure to meet the required SO₂ reduction, allowances will be deducted (based on the formula in section 72.42(f)(1)(i)(B)) from the unit's compliance subaccount for the year of the violation.

● Permit Requirements

This category contains requirements for retired units and general permit requirements. If a DR does not follow the procedures as required by the rule for permit modifications, application of fast-track modifications or administrative permit amendments, then the permitting authority will first send a letter to the DR requesting further information. If the DR does not respond to the letter, then the request will be denied. For violations other than recordkeeping or procedural violations an ACO, APO, or CJ (preceded by an NOV) may be needed.

● Designated Representative

This category of potential violations deals primarily with the certification statements and complete permit application submissions required of the DR. Where the required submissions are incomplete on the deadline (e.g., not signed by the DR), ARD should send a letter to the DR requesting that the submitted document be completed and resubmitted within 30 days. If the requested information is not resubmitted, ARD will deny the acid rain permit application or affected portion of the permit application, and notify OECA and the applicable Region for an appropriate enforcement response.

In cases where a source has more than one DR, or does not have a common DR as required under a Phase II repowering extension plan until the existing unit is permanently retired under the plan, the enforcement response may range from an ACO/APO (preceded by an NOV) to CJ depending on the circumstances of the violation and past record of the DR.

• Required Methods, Conditions, and Procedures

If a unit does not meet the conditions to be considered in a reduced utilization plan, then the request will be denied by ARD. If a source does not properly activate or terminate a compliance option, then the activation or termination may be denied. For improper termination of a repowering plan, the enforcement response should range from an FC through ACO, APO to CJ depending on the circumstances of the violation and past record of the DR. For the other violations in this category, the enforcement response may range from an ACO, APO, to CJ.

• Incomplete Submissions/Submission Deadline

The Rule requires complete submission of information as specified in the various subparts. If, for example, a compliance plan is not complete as specified, a letter should be sent to the DR requesting any additional information necessary (see section 72.61). The DR shall submit the additional information within 30 days, or request an extension for submitting the information. If the DR does not respond within 30 days, and an extension for submission is not granted, that compliance plan option of the acid rain permit application will be disapproved. The same is true for the whole acid rain permit application. If the general application is not complete, and the DR does not respond to a request for additional information, then the entire acid rain permit may be denied. If the source operates a unit without the proper permit or permit application, then the enforcement response may range from an ACO, APO to CJ.

For reporting violations listed in this category, the minimum enforcement response is a Field Citation.

For permit applications, compliance options, dispatch system identifications, retired unit exemptions, and repowering plans, the rule requires that submissions be made by certain deadlines. If a submission is made prior to the deadline, but is not complete, then the procedure mentioned in the Incomplete Submission section will be followed. If a submission of the required information is not made by the deadline, the request may be denied and the enforcement response ranges from an ACO, APO to CJ.

For new or retired units that are no longer exempted, or for the commencement of operation, removal from operation, or

decision to terminate repowering extension plans, failure to meet the submission deadline will result in an ACO, APO to CJ.

NO. Rule (to be added)

APPENDIX 1
ACID RAIN COMPLIANCE/ENFORCEMENT RESPONSE
EXCESS EMISSIONS RULE

REGULATION	VIOLATED REQUIREMENT	ENFORCEMENT RESPONSE	ENFORCEMENT LEAD
EXCESS EMISSIONS			
Deductions of allowances to offset excess emissions of sulfur dioxide - section 77.5	Hold enough allowances in the appropriate compliance subaccount to cover the deductions to be made in accordance with paragraph (a) or paragraph (c) of section 77.5	Administrative Penalty Order Civil Judicial	ORE/AED
Penalties for excess emissions of sulfur dioxide and nitrogen dioxides - section 77.6	Pay, without demand, an excess emissions penalty, as calculated under paragraph (b) of section 77.6	Administrative Penalty Order Civil Judicial	ORE/AED
Offset plans for excess emissions of sulfur dioxide - section 77.3	Submit to the Administrator a complete proposed offset plan to offset excess emissions, not later than 60 days after the end of any calendar year during which an affected unit had excess emissions of sulfur dioxide	Administrative Penalty Order Civil Judicial	ORE/AED

APPENDIX 2
ACID RAIN COMPLIANCE/ENFORCEMENT RESPONSE
CEMS RULE

REGULATION	VIOLATED REQUIREMENT	ENFORCEMENT RESPONSE	ENFORCEMENT LEAD
CONTINUOUS EMISSION MONITORING			
Monitoring Requirements			
75.10	Install a SO ₂ CEMS with DAHS and a flow monitor, NO _x CEMS with DAHS and a diluent monitor, CO ₂ CEMS with DAHS, and a CEMS with DAHS	Administrative Penalty Order Civil Judicial	Regions
Reporting Requirements			
75.64	Submit electronic quarterly reports to the Administrator	Administrative Penalty Order Civil Judicial	ORE/AED
75.60 75.61 75.62 75.63	Submit all certification or recertification notifications, certifications or recertification applications, monitoring plans, petitions for alternative monitoring systems, and other communications required to the Administrator Submit copies of certification or recertification notification, certification or recertification applications and monitoring plans to the appropriate Regional Office of U.S. EPA and appropriate State or local air pollution control agency	Field Citation Administrative Compliance Order Administrative Penalty Order	Regions
75.65	Report excess emissions of opacity to the applicable State or local air pollution control agency, in a format specified by applicable State or local air pollution control agency	Field Citation Administrative Compliance Order Administrative Penalty Order	States

REGULATION	VIOLATED REQUIREMENT	ENFORCEMENT RESPONSE	ENFORCEMENT LEAD
Recordkeeping Requirements			
75.50	Maintain for each affected unit, a file of all measurements, data, reports, and other information required at source in a form suitable for inspection for at least three (3) years from the date of each record	Field Citation Administrative Compliance Order Administrative Penalty Order	Regions/States
Monitoring plans			
75.53	Prepare and maintain a monitoring plan Update the monitoring plan whenever a change has been made to either the certified CEMS or COMS including the DAHS or in the flue gas handling system, that requires recertification	Field Citation Administrative Compliance Order Administrative Penalty Order	Regions/States

REGULATION	VIOLATED REQUIREMENT	ENFORCEMENT RESPONSE	ENFORCEMENT LEAD
Operation & Maintenance Requirements			
75.20 75.22	Certify a SO ₂ CEMS with DAHS and a flow monitor, NO _x CEMS with DAHS and a diluent monitor, CO ₂ CEMS with DAHS, and a COMS with DAHS	Field Citation Administrative Penalty Order Civil Judicial	Regions
75.20 75.21	Operate; and maintain a SO ₂ CEMS with DAHS and a flow monitor, NO _x CEMS with DAHS and a diluent monitor, CO ₂ CEMS with DAHS, and a COMS with DAHS.	Field Citation Administrative Compliance Order Administrative Penalty Order Civil Judicial	Regions/States
75.24	Take corrective action and repeat the tests applicable to the "out-of-control parameter" as described in Appendix B	Field Citation Administrative Compliance Order Administrative Penalty Order Civil Judicial	Regions/States
Missing Data Substitution Procedures			
75.30 Except as provided in section 75.34	Provide substitute data for each affected unit according to missing data procedures in this subpart whenever unit combusts any fuel and a valid hour of SO ₂ concentration data (ppm), or flow data (scfh), or NO _x emission rate data (lb/mm BTU) has not been measured and recorded for an affected unit	Field Citation Administrative Compliance Order Administrative Penalty Order	Regions/States

**APPENDIX 3
ACID RAIN COMPLIANCE/ENFORCEMENT RESPONSE
PERMIT RULE**

REGULATION	VIOLATED REQUIREMENT	ENFORCEMENT RESPONSE	ENFORCEMENT LEAD
PERMITS REGULATION			
Emission Limits			
72.42(f) (1) (i)	Demonstration of at least 90 percent reduction of SO ₂ at a control unit governed by an approved Phase I extension plan.	Deduct Allowances Administrative Penalty Order Civil Judicial	Regions/States
72.42(f) (1) (ii)	Meet NO _x emission limitation.	Administrative Penalty Order Civil Judicial	Regions/States
72.44	Not transfer allocated allowances to any account other than the unit accounts of other units at the same source as the repowering unit.	Administrative Penalty Order Civil Judicial	Regions/States
Permit Requirements			
72.8(d) (1)	Not emit any SO ₂ and NO _x during exempted period for retired unit.	Administrative Compliance Order Administrative Penalty Order Civil Judicial	Regions/States
72.90	Submit annual compliance certification	Administrative Compliance Order Administrative Penalty Order Civil Judicial	Regions/States

REGULATION	VIOLATED REQUIREMENT	ENFORCEMENT RESPONSE	ENFORCEMENT LEAD
72.8	Not resume operation unless the DR submits an Acid Rain permit application for the unit not less than 24 months prior to operation. v/.	Administrative Compliance Order Administrative Penalty Order Civil Judicial	Regions/States
72.9, 72.30	Have an Acid Rain permit or permit application, and operate in accordance with the permit or permit application.	Administrative Compliance Order Civil Judicial	Regions/States
72.80, 72.81, 72.82, 72.83	Retain the required documents for 5 years unless otherwise specified. Follow the proper procedures as required for permit modifications.	Administrative Compliance Order Administrative Penalty Order Civil Judicial	Regions/States
Designated Representative			
72.20, 72.21, 72.23	Signed certifications by the authorized DR for all submissions. Serve notice to the owners/operators of the source of any written determinations by the Administrator or permitting authority. Revised certificate of representation following changes in owners, operators, DR or alternative DR.	Administrative Penalty Order Administrative Compliance Order Civil Judicial	Regions/States
72.44	Have common DR for units governed by the plan under paragraph (b) (2) of this section (Phase II repowering extension) until unit is permanently retired under the plan.	Administrative Compliance Order Administrative Penalty Order Civil Judicial	Regions/States

REGULATION	VIOLATED REQUIREMENT	ENFORCEMENT RESPONSE	ENFORCEMENT LEAD
Required Methods, Condition and Procedures			
72.7	For each exempted New Unit, determine sulfur content of the fuel by specified method and retain records as required.	Administrative Compliance Order Administrative Penalty Order Civil Judicial	Regions/States
72.40, 72.41, 72.43, 72.44	Proper activation of a conditionally approved compliance option. Proper termination of a compliance option.	Administrative Compliance Order Administrative Penalty Order Civil Judicial	Regions/States
72.43	Meet requirements to be considered as reduced utilization plan that has been approved by the overseeing agency.	Administrative Penalty Order	Regions/States
Incomplete Submission/Submission Deadlines			
72.7, 72.8	Complete Acid Rain permit when new unit is no longer exempted. Retired units exemption petition.	Administrative Compliance Order Administrative Penalty Order Civil Judicial	Regions/States
72.9, 72.30, 72.40, 72.41, 72.42, 72.43, 72.44	Complete Acid Rain permit application or permit reapplication including compliance options.	Administrative Compliance Order Administrative Penalty Order Civil Judicial	Regions/States

REGULATION	VIOLATED REQUIREMENT	ENFORCEMENT RESPONSE	ENFORCEMENT LEAD
72.33	Complete identification of dispatch system, or petition to treat as the dispatch system for an owner's portion of the unit, the dispatch system of another unit. Submission of required reports for the dispatch system.	Administrative Compliance Order Administrative Penalty Order Civil Judicial	Regions/States
72.94	Repowering extension plan design and engineering contract requirements, removal from operation, commencement of operation, or decision to terminate.	Administrative Compliance Order Administrative Penalty Order Civil Judicial	Regions/States

APPENDIX 4
ACID RAIN NO. Rule

APPENDIX 5
EPA ENFORCEMENT GUIDANCE DOCUMENTS

Index of Guidances Relevant to Initiation of Enforcement Actions

IN THE GENERAL ENFORCEMENT POLICY COMPENDIUM

REFERRAL PROCESS

Memorandum of Understanding Between DOJ and EPA (GM-3)

Policy on Invoking Section 9 of the DOJ/EPA Memorandum of Understanding (GM-63)

Draft DOJ/EPA Litigation Procedures (GM-8)

Process for Conducting Pre-Referral Settlement Negotiations on Civil Enforcement Cases (GM-73)

Model Litigation Report Outline and Guidance (GM-48)

General Operating Procedures for EPA's Civil Enforcement Program (GM-12)

Implementing Nationally Managed or Coordinated Enforcement Actions (GM-35)

Headquarters Review and Tracking of Civil Referrals (GM-26)

Expansion of Direct Referral of Cases to DOJ (GM-69)

Implementation of Direct Referral for Civil Cases (GM-18)

DOJ Procedure for Returning Certain Unfiled Cases to EPA for Further Processing (GM-78)

Hold Action Requests (GM-90)

PENALTIES

Policy on Civil Penalties (GM-21)

A Framework for Statute-Specific Approaches to Penalty Assessments (GM-22)

Documenting Penalty Calculations and Justifications in WPA Enforcement Actions (GM-88)

Remittance of Fines and Civil Penalties (GM-38)

Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment (GM-33)

Division of Penalties with State and Local Governments (GM-45)

Guidance on Determining a Violator's Ability to Pay a Civil Penalty (GM-56)

Policy on the Use of Supplemental Enforcement Projects in EPA Settlements (GM-77)

Guidance on Calculating After Tax Net Present value of Alternative Payments (GM-51)

Use of Stipulated Penalties in EPA Settlement Agreements (GM-75)

Procedures for Assessing Stipulated Penalties (GM-67)

CONTRACTOR LISTING

Implementation of Mandatory Contractor Listing (GM-32)

Guidance on Implementing the Discretionary Contractor Listing Program (GM-53)

SETTLEMENTS

Form of Settlement in Civil Judicial Cases (GM-42)

Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases (GM-62)

Enforcement Settlement Negotiations (GM-52)

Multi Media Settlements of Enforcement Cases (GM-80)

Interim Policy on the Inclusion of Pollution Prevention and Recycling Provision in Enforcement Settlements (GM-79)

Final EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements (GM-52)

Guidance for Drafting Judicial Consent Decrees (GM-17)

Procedures for Modifying Judicial Consent Decrees (GM-68)

APPENDIX 6

ACID RAIN SUPPLEMENTAL ENFORCEMENT RESPONSES

vi.

PARALLEL PROCESSING

Revised EPA Guidance for Parallel Proceedings (GM-83)

Procedures for Requesting and Obtaining Approval of Parallel Proceedings (GM-82)

Supplement to Parallel Proceedings Guidance and Procedures for Requesting and Obtaining Approval of Parallel Proceedings (GM-84)

Air-Specific Documents

Timely and Appropriate Enforcement Response to Significant Air Pollution Violators - John Seitz and Robert Van Heuvelen, February 7, 1992

Guidance on Choosing the Appropriate Forum in Clean Air Act Civil Enforcement Actions - Michael S. Alushin and John Rasnic, October 29, 1991.

Clean Air Act Stationary Sources Civil Penalty Policy - William G. Rosenberg and Edward E. Reich, October 25, 1991.

A T T A C H M E N T 2

ACID RAIN ADDENDUM TO THE
TIMELY AND APPROPRIATE ENFORCEMENT RESPONSE TO
SIGNIFICANT AIR POLLUTION VIOLATORS

Acid Rain Addendum to the Timely and Appropriate Enforcement
Response to Significant Air Pollution Violators

I. SCOPE & GUIDANCE APPLICABILITY

This guidance is an addendum to the "Timely and Appropriate Enforcement Response to Significant Air Pollution Violators", issued on February 7, 1992 and is applicable to violators of the Acid Rain Program (40 CFR Parts 72, 75, and 77). This guidance lays out the definition of "significant violator" for the Acid Rain Program since sources covered by the Acid Rain Program were not included in the definition of "significant violator" in the February 7, 1992 guidance. For areas not covered in this addendum (i.e., timelines for enforcement actions, etc.), refer to the "Timely and Appropriate Enforcement Response to Significant Air Pollution Violators."

The Acid Rain addendum is an initial step towards defining a significant violator of the acid rain program. It is expected that the addendum will be modified in future years to reflect experiences in the implementation and evolution of the acid rain program.

II. SIGNIFICANT VIOLATOR (SV) DEFINITION

Agencies shall deem a source to be a SV if it is a "Major" source (as defined by the CAAA) and it violates one or more of the following requirements:

- A. install, certify, operate and maintain required CEMS/COMS system (including DAHS) or approved alternative, 40 CFR §75.10(a) & (b);
- B. have an Acid Rain Permit, §72.9(a)(2)(ii);
- C. hold allowances, as of the allowance transfer deadline, in the unit's compliance subaccount, not less than the total annual emissions of sulfur dioxide for the previous calendar year from the unit §72.9(c)(1)(i);
- D. submit a complete proposed offset plan, §77.3;
- E. submit electronic quarterly reports to the administrator, §75.64;
- F. for units governed by a Phase I extension plan, demonstrate at least 90% reduction of SO₂ in 1997, 1998, or 1999, §72.42(f)(1)(i);
- G. ensure that all certification tests for the required CEMS/COMS are completed not later than the specified dates, §75.4;
- H. any provision of either a Federal Consent Decree or Federal Administrative Order resolving Clean Air Act violation(s);

- I. any substantive provision of a State Judicial Order or a State Administrative Order which was issued for an underlying Acid Rain violation.

The following sections are the same as in the "Timely and Appropriate Enforcement Response to Significant Air Pollution Violators", issued on February 7, 1992 (SV/T&A policy):

- III. PROCESSING OF SIGNIFICANT VIOLATORS
- IV. T&A TIMELINES FOR ENFORCEMENT ACTION
- V. PENALTIES
- VI. CONSULTATION AND DATA TRANSFER

The following ranking criteria may be used in conjunction with Appendix A to the SV/T&A policy:

Criteria	Environmental Weight Factor/Violation
1. Failure to have an acid rain permit	10
2. Failure to submit a complete proposed offset plan or pay without demand, an excess emissions penalty	10
3. Failure to install, certify operate and maintain required CEMS/COMS	10
4. Failure to submit electronic quarterly reports or complete all certification tests for the required CEMS/COMS by the specified dates	5
5. Failure to hold allowances as of the transfer deadline	5
6. Failure to demonstrate at least 90% reduction of SO ₂ for units governed by a Phase I extension plan	5

VA